



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Valley Forge Flag Company, Inc.

File: B-283130

Date: September 22, 1999

Robert G. Fryling, Esq., and Edward J. Hoffman, Esq., Blank Rome Comisky & McCauley, for the protester.

James S. DelSordo, Esq., Barbara S. Kinosky, Esq., and James S. Phillips, Esq., Williams Mullen Clark & Dobbins, for Allied Materials and Equipment Co., Inc., an intervenor.

Merilee Rosenberg, Esq., Department of Veterans Affairs, for the agency.

Jacqueline Maeder, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly awarded contract to bidder whose bid was nonresponsive because it took exception to the delivery schedule required by the solicitation.

DECISION

Valley Forge Flag Company, Inc. protests the award of a contract to Allied Materials and Equipment Co., Inc. under invitation for bids (IFB) No. 101-01-99, issued by the Department of Veterans Affairs (VA). Valley Forge contends that Allied's bid should have been rejected as nonresponsive because it took exception to the delivery schedule required by the solicitation.

We sustain the protest.

The IFB, issued as a small business set-aside on March 31, 1999, contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity contract¹ for an

¹An indefinite-delivery, indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services to be furnished during a fixed period, with deliveries or performance to be scheduled by placing orders with the contractor. Federal Acquisition Regulation (FAR) § 16.504(a).

estimated 321,000 interment (burial) flags. IFB § B.1. The solicitation specified that the contract term was from October 1, 1999 through September 30, 2000, IFB § F.1, and that during that time period “VA will place orders” for a minimum of 305,000 and a maximum of 385,000 flags. IFB § B.2. The solicitation provided that the “total contract performance period shall not exceed March 30, 2001, in accordance with FAR Clause 52.216-22 ‘Indefinite Quantity,’”² which was incorporated by reference in the IFB. IFB § F.1. The IFB advised that the first delivery under the contract would be required no sooner than 180 days after contract award, IFB §§ H.3, F.2, and that the agency desired delivery of subsequent orders within 30 days of receipt of the order. IFB § F.2. In the alternative, the solicitation advised as follows:

If the offeror is unable to meet the desired delivery schedule, it may without prejudicing evaluation of its offer, propose a delivery schedule below. However, the offeror’s proposed delivery schedule must not extend the delivery period beyond the time for delivery in the Government’s required delivery schedule as follows:

REQUIRED DELIVERY SCHEDULE

ALL ITEMS (after first delivery)	WITHIN 45 DAYS AFTER RECEIPT OF ORDER (ARO)
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Offers that propose delivery of a quantity under such terms or conditions that delivery will not clearly fall within the applicable required delivery period specified above, will be considered nonresponsive and rejected. If the offeror proposes no other delivery schedule, the desired delivery schedule above will apply.

²Paragraph (d) of the clause at FAR § 52.216-22 provides as follows:

Any order issued during the effective period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order. The contract shall govern the Contractor’s and Government’s rights and obligations with respect to that order to the same extent as if the order were completed during the contract’s effective period; provided, that the Contractor shall not be required to make any deliveries under this contract after ____ [insert date].

At page 1 of chapter C, part 2, the IFB advised bidders to insert the date “March 30, 2001” in the blank in the clause.

IFB § F.2. The IFB incorporated by reference FAR § 52.216-19 with respect to order limitations, providing here, in relevant part, for a minimum order of 10 flags and a maximum single order (or series of orders from the same ordering office within 15 days) of 305,000 flags. IFB ch. C, part 2, at 1. The IFB did not contain any other limitations on the placement of orders.

Seven bids, including Allied's and Valley Forge's, were received by the amended May 18 bid opening. Contracting Officer's Statement at 1. The low bid was rejected as nonresponsive. Allied's bid of \$23.98 per unit (\$7,697,580 for the 321,000 estimated units) was next low and Valley Forge's bid of \$24.54 per unit (\$7,877,340 for the 321,000 estimated units) was third low. As a delivery schedule, Allied proposed in its bid that it would deliver 46,782 flags "within 180 days after receipt of contract" and, for all subsequent orders, it would deliver "4,873 per week until completed." Agency Report, exh. 3, Allied Bid, § F.2.

The contracting officer determined that Allied's proposed delivery schedule was responsive on the basis that Allied could deliver the estimated quantity of flags before March 30, 2001. Specifically, using the estimated quantity of 321,000 flags and a projected award date of June 23, the contracting officer calculated the first delivery (46,782 flags) on December 20, 1999 (180 days after the contract award date) and weekly deliveries of 4,873 flags thereafter, beginning on December 27.³ The contracting officer determined that Allied could deliver the remaining 274,218 flags at the rate of 4,873 flags per week within 57 weeks (4,873 times 57 equals 277,761), or by January 22, 2001.

After finding Allied's bid responsive, VA requested additional information regarding Allied's financial resources and the firm's ability to produce the flags. Allied responded by letter dated June 8. In addition to providing additional information about the firm, Allied indicated that it would draw on its current labor pool, hire additional production personnel, and obtain the necessary production equipment "to effectively produce a minimum of 4,873 flags per week in accordance with the requirements of [the] IFB" Agency Report, exh. 5, Letter from Allied to Contracting Officer 2 (June 8, 1999). In response, by letter dated June 10, the contracting officer asked Allied:

What is the maximum [number of flags] that Allied can produce in one week? This question is raised in order to determine Allied capable of providing the maximum quantity of 385,000 flags should they be ordered.

³The contracting officer states that she used the estimated quantity in her calculations rather than the minimum or maximum quantities because the bid prices were evaluated on the basis of the estimated quantity and because, historically, the estimated quantity has been ordered at contract award with no additional orders issued. Contracting Officer's Statement at 2.

Agency Report, exh. 9, Letter from Contracting Officer to Allied 1 (June 10, 1999). By letter dated June 15, Allied responded that the firm “possesses the capability to achieve a production of 6000 interment flags per week.” Agency Report, exh. 9, Letter from Allied to Contracting Officer 1 (June 15, 1999).

Based on the information supplied by Allied concerning its capabilities and financial resources, the contracting officer determined that Allied was able to perform the contract. Award was made to Allied on June 24. Valley Forge filed this protest with our Office on July 1. The agency reports that it has suspended performance of the contract pending our decision.

Valley Forge argues that Allied’s proposed delivery schedule changed the IFB’s mandatory delivery terms and is nonresponsive.⁴ Protest at 4. In particular, the protester contends that Allied’s proposed delivery terms do not conform to the IFB requirements because the awardee has offered to provide only a limited number of flags in 180 days and, again, a limited number of flags every week thereafter. We agree that Allied’s bid takes exception to the IFB’s delivery requirements and is therefore nonresponsive.

All bidders must compete for sealed bid contracts on a common basis. In order to be responsive and considered for award, a bid as submitted must contain an unequivocal offer to perform, without exception, the exact thing called for in the IFB, in total conformance with the material terms of the solicitation. NR Vessel Corp., B-250925, Feb. 11, 1993, 93-1 CPD ¶ 128 at 2-3. Delivery terms are a material requirement and thus a bid that takes exception to the stated delivery terms is nonresponsive and must be rejected. Copley Int’l Trading Partners; Western States Elec., Inc., B-248751, B-248751.3, Sept. 10, 1992, 92-2 CPD ¶ 167 at 3. Further, a bid which is nonresponsive on its face may not be made into a responsive bid by post-bid opening clarifications or corrections. Lathan Constr. Corp., B-250487, Feb. 5, 1993, 93-1 CPD ¶ 107 at 3-4.

⁴Valley Forge also contends that Allied will not comply with the mandatory Limitation on Subcontracting clause set forth at FAR § 52.219-14 and included by reference in the IFB. In particular, the protester complains that the contracting officer did not ask the pre-award survey team to investigate whether Allied could perform 51 percent of the work, as required by the small business set-aside clause. This matter is not for review by our Office. Whether Allied can comply with the limitations on subcontracting is a matter of responsibility. See Corvac, Inc., B-254757, Jan. 11, 1994, 94-1 CPD ¶ 14 at 4-5. We will not review an affirmative determination of responsibility absent a showing of possible fraud, bad faith, or misapplication of definitive responsibility criteria on the part of contracting officials. 4 C.F.R. § 21.5(c). Definitive criteria are not in issue, and the record provides no basis to conclude that the contracting officer’s determination in this regard was motivated by bias or bad faith.

Here, Allied's bid is nonresponsive because Allied inserted a delivery schedule in its bid which clearly takes exception to the IFB's delivery requirements. The IFB provided that no delivery would be required sooner than 180 days after contract award. Since award was made on June 24, this would mean that no delivery would be required before December 21. With that one exception, the IFB required delivery of any quantity ordered (up to the maximum per-order limit of 305,000 flags) within 45 days of receipt of the order.

Allied's bid takes exception to these delivery terms by specifying the quantity that the firm will deliver and the time frame within which that quantity will be delivered. Thus, while the solicitation would permit the agency to order, for example, 100,000 flags in its initial order, and to require delivery 180 days after contract award, Allied proposes to deliver only 46,782 flags 180 days after contract award. Similarly, under the terms of the IFB, the agency may order 60,000 flags in a subsequent order, and delivery of those flags would be required within 45 days of receipt of the order--yet Allied has agreed to deliver only approximately 30,000 flags within the 45-day required delivery term (4,873 flags per week for somewhat more than 6 weeks). For this reason, we agree with the protester that Allied's delivery schedule takes exception to the delivery requirements specified by the IFB and therefore should have been rejected as nonresponsive.

The contracting officer's responsiveness determination looked only to Allied's ability to deliver the total 321,000 estimated quantity by March 30, 2001, and simply ignored the solicitation's delivery terms. While the March 30, 2001 date and the clause in which it is inserted, FAR § 52.216-22, identify the latest date on which the contractor can be required to make deliveries, that clause is irrelevant to the 45-day delivery requirement and it cannot reasonably be interpreted as vitiating the agency's rights under the unambiguous delivery terms of the solicitation. Moreover, even under VA's mistaken application of the March 30, 2001 date, the agency apparently was concerned that Allied's bid schedule could not accommodate the maximum quantity permitted under the IFB. In response to that concern, Allied essentially attempted to modify its bid after bid opening (from 4,873 flags per week to a minimum of that quantity per week). As noted above, post-bid opening clarifications or corrections cannot serve to make Allied's nonresponsive bid responsive. Lathan Constr. Corp., supra, at 3-4.

In fashioning our recommendation for corrective action, we recognize that the IFB's delivery terms may not reflect the agency's actual needs. Specifically, the agency's arguments in response to the protest indicate that the 45-day delivery terms may overstate the agency's needs; moreover, as noted above, the record shows that, historically, VA has ordered the estimated quantity at contract award, with no additional orders being issued. Accordingly, we recommend that the agency reevaluate its quantity and delivery requirements. If an indefinite-quantity delivery-order contract and the 180-day initial and 30/45-day subsequent delivery requirements reflect the agency's needs, the agency should terminate Allied's

contract for the convenience of the government and award the contract to the protester, if otherwise appropriate. If, however, the agency's needs are not accurately stated in the solicitation, the agency should terminate Allied's contract for the convenience of the government and resolicit under a solicitation revised to reflect the agency's actual requirements. In addition, we recommend that the protester be reimbursed its costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (1998). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States